

**IN THE COURT OF ADDL. SR. CIVIL JUDGE &
J.M.F.C., SINDAGI, AT: SINDAGI.**

Present: Sri H.K.Umesha,

B.A., LL.B.,

**Addl. Sr. Civil Judge and JMFC,
Sindagi.**

Dated this the 19th day of January-2021

Original Suit No. 80/2018

Plaintiff: 1) Bashirahammad s/o. Abdulkarim
Shipai.

- Versus-

Defendants: 1) Husenbasha Shipai and others.

I.A. No. I

**Applicant:
(Plaintiff)**

1. Bashirahammad s/o. Abdulkarim
Shipai, age: 45 years, occ: agril.,
r/o. Hunashyal, tq. Sindagi,
dist. Vijayapura.

- Versus -

**Opponents:
(Defendants)**

1. Husenbasha Shipai & others.

(Sriyuths: NSS & BGM, Advs. for applicant/plaintiff)
(Sri MKP, Adv. for opponents/defts-3,4 & 6 to 9)
(Sri ZKC, Adv. for defendants-1, 2 and 5) (No WS)

**ORDERS ON IA-I FILED U/ORDER XXXIX RULE
1 & 2 OF C.P.C.**

Applicant/plaintiff has filed this application praying this Court to grant temporary injunction restraining the opponents/defendants, their agents, servants, any person/s acting or purporting to act on their behalf, from alienating the suit properties till disposal of this suit.

2. It is the contention of plaintiff that, he himself and defendants-1 to 7 are enjoying the suit schedule properties jointly as tenants in common and there is no partition of suit properties by metes and bounds till today. He has got $2/13^{\text{th}}$ share and defendants-1, 2, 3 and 5 have got $2/13^{\text{th}}$ share each and defendants-4, 6 and 7 have got $1/13^{\text{th}}$ share each in the suit properties. Plaintiff and defendants-1 to 7 as per their mutual understanding though enjoying the suit properties, no specific shares are not yet carved out in the suit schedule properties. Plaintiff to

prevent the miscarriage of justice and to avoid the complications in the litigations has filed application in this suit restraining the defendants from further alienating the suit properties, entering their names in the revenue records on the basis of the said fake sale deed and taking possession of the suit properties. If the application is not allowed, then the very purpose of filing this suit will be frustrated. The defendants have no manner of right to transfer any part in the suit schedule properties, which are the joint properties of the family of plaintiff and defendants. He further stated that, prima-facie case is in his favour and balance of convenience also lies in his favour and if the application is not allowed, irreparable injury would cause to him than the defendants and hence, he prays to allow the application.

3. On the other hand defendants have appeared through their counsel. Defendant-3 has filed written

statement and defendants-4 and 6 to 9 have adopted the same. Defendants-4 and 6 to 9 have filed objections to IA No.I contending that the suit of plaintiff seeking decree for the partition and separate possession in the suit properties is mis-conceived and not maintainable in the eye of law. Plaintiff had filed suit OS No.380/2012 on the file of Civil Judge, Sindagi, claiming partition and separate possession of 1/6th share and obtained exparte order in the said suit. The deceased Abdul karim has sought for vacating the orders of temporary injunction. On the said order, plaintiff had challenged the orders on IA Nos.1 & 2 by filing MA-6/2015. The said appeal was dismissed on 18-09-2017. Thereafter plaintiff filed an application for withdrawal of the suit by filing fresh suit with same cause of action. But, the said application rejected by the Civil Court, Sindagi. The application filed by the plaintiff is also not maintainable in the eye of law and the application filed by the plaintiff u/Order XXXIX Rule 1 and 2

CPC, is already decided by the Court. On the same ground, the same application is not maintainable in the eye of law. So there is no prima facie case in favour of plaintiff and balance of convenience lies more in favour of defendants than the plaintiff. If the injunction is granted, irreparable injury would cause to them etc., and hence, defendants-4 and 6 to 9 pray to dismiss the application.

4. Heard arguments and perused records.

5. The following points that would arise for my consideration are:

1. Whether applicant/plaintiff has made out a prima-facie case?
2. Whether balance of convenience lies in his favour?
3. Whether applicant/plaintiff would suffer irreparable injury, if the prayer for interim injunction is dis-allowed?
4. What order?

6. My findings to the above points are as

follows.

Point No.1: In the negative;

Point No.2: In the negative;

Point No.3: No;

Point No.4: As per final order; for the following:

REASONS

7. **Points-1 to 3:** Since these three points are inter-connected to each other, to avoid repetition of facts, they are taken up together for common discussion.

8. It is a suit for partition and separate possession filed by the plaintiff against the defendants. It is the contention of plaintiff that, the suit properties originally belonged to deceased Abdulkareem s/o. Hajihasansab Shipai, who is none other than the father of plaintiff and defendants and plaintiff and defendants-1 to 7 are enjoying the suit schedule properties jointly as tenants in common and there is no partition of suit schedule properties by

metes and bounds till today. Plaintiff and defendants-1 to 7 as per their mutual understanding though enjoying the schedule properties, no specific share is carved out in the suit properties. It is further case of plaintiff that, after the death of his father and mother, plaintiff and defendants-1 to 7 accepted their eldest member in the family i.e., Husenbasha as Karta of the family. It is further case of plaintiff that, defendant-3 filed suit for declaration and consequential relief of injunction against Abdulkareem and the said suit was compromised on 17-09-2012. Thereafter the revenue entries entered in the names of defendants-8 and 9 and defendant-3 illegally selling the plots, plotwise of suit properties. The said compromise is not binding the right of plaintiff. Hence, plaintiff filed suit for partition and separate possession of his 2/13th share in the suit property and in order to prevent the mis-carriage of justice and to avoid the complications and multiplicity of proceedings he filed the present

application restraining the defendants from alienating the suit properties.

9. On the other hand, it is the contention of defendants that, earlier suit was filed by the plaintiff in OS-80/2012 and said suit was contested and in the said case plaintiff obtained ex-parte order and after contest said order was vacated. As against that order, plaintiff filed Misc. Appeal in MA-6/2015 and the said appeal was also dismissed. Thereafter, plaintiff filed an application for withdrawal of suit by filing fresh suit on the same cause of action and the said application was rejected and the suit was dismissed as not pressed. Hence, this application is not maintainable and it attracts the provisions of Sec. 11 of CPC, and prays to reject the application.

10. Both learned counsels for plaintiff and defendants have submitted their arguments and they reiterated their contentions of plaint averments and

written statement averments respectively.

11. In the light of above submissions and contentions, I have carefully perused the pleadings of both parties and also documents placed by both parties. It is an admitted fact that, the property in dispute was originally belonged to one Abdulkareem. Further it is an admitted fact that, earlier suit filed in OS-380/2012 was dismissed as not pressed. Further on perusal of documents placed by defendant it is crystal clear that, earlier in the said suit same kind of application was filed by the present plaintiff and said application was rejected and as against the said rejection, he has preferred miscellaneous appeal in MA No.6/2015 and said miscellaneous appeal was also dismissed on 18th September-2017. The properties involved in this suit and the original suit - 380/2012 are one and the same and the said suit was also filed for partition and in the said suit, same kind of application was filed restraining the present

defendants from alienating the suit properties. Admittedly said application was dismissed and even in the appeal also the order of the Hon'ble trial Court was confirmed. After dismissal of the miscellaneous appeal, present plaintiff had filed an application for withdrawal of suit and withdrawn the said suit. Now again the present application is filed along with the suit. When once his application was rejected in another suit, the question of considering the same nature of application in the present suit would not arise at all and it is not maintainable. In fact plaintiff has suppressed the true facts regarding rejection of his application in OS-380/2012. By suppressing the same he has filed this application. It shows that, he has not approached the Court with clean hands.

12. Even on perusal of pleadings of the parties prima facie it discloses that, the properties in dispute originally belonged to deceased Abdulkareem Hajihasansab Shipai and said Abdulkareem during

his lifetime made some arrangements regarding his properties under the document, dtd. 14-06-2005 and some partition was effected during his lifetime only and plaintiff was a party to that proceedings. Under Mohammedan Law, the deceased Abdulkareem being a owner of property has got every right to dispose of the properties standing in his name and no person has any semblance of right to question the same. When he has made some arrangements, that too with the knowledge and other defendants, plaintiff cannot challenge the same. Under such circumstances at this stage plaintiff has not made out good grounds to allow the application. Since he has not approached with clean hands, he is not entitled for any relief that too an equitable relief of injunction. There is no balance of convenience lies in favour of plaintiff at this stage and no loss would be cause to the plaintiff if the application is rejected. Thus, for the above reasons, I answer points-1 to 3 accordingly.

13. **Point-4**: In view of the discussions made above, I proceed to pass the following:

O R D E R

I.A. No.I filed by the applicant/plaintiff u/Order XXXIX Rule 1 & 2 of CPC, is hereby **rejected**. Accordingly the Ex-parte T.I. order granted on 19-11-2018 is hereby **recalled**.

Costs are made easy.

(Typed to my oral dictation directly on computer by the stenographer, script corrected, signed by me and then pronounced in the open Court on: **19th day of January-2021.**)

(H.K.Umesha)
Addl. Sr. Civil Judge & J.M.F.C.,
Sindagi.

VSM/STENO